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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**
10

11 David Otto Schwake,
12 Plaintiff,

13 vs.

14 Arizona Board of Regents; Michael M.
Crow; Kevin Cook; Norean Sablan; Ron
15 Hicks; Gregory Castle; and Thomas
Seager,

16 Defendants.
17

Case No. CV15-00696-PHX-SPL

REPLY RE: MOTION TO DISMISS

18
19 Plaintiff does not contest that his state-law claims against the Arizona Board of
20 Regents (ABOR) are barred by the Eleventh Amendment. (Response [doc. 32] at 11.)
21 His Title IX claim against ABOR is insufficient as a matter of law. His § 1983 claims
22 against the individual Defendants are barred by qualified immunity, and his state-law
23 claims against them are barred by his failure to serve them with a notice of claim, a
24 prerequisite to suit. Because Plaintiff fails to state a claim for relief, his Complaint
25 should be dismissed.

26 **I. The Exhibits to the Motion to Dismiss Are Appropriate for Consideration.**

27 Plaintiff first objects to the Court's consideration of the four exhibits attached to
28 the Motion to Dismiss. (Response at 3.) While Plaintiff is correct that extrinsic

1 materials may not be considered on a Rule 12(b)(6) motion, he is incorrect in calling the
2 exhibits extrinsic. A document is not outside the complaint, and therefore may be
3 considered, if it is referred to in the complaint and its authenticity is not questioned.
4 *Cooper v. Pickett*, 137 F.3d 616, 622-23 (9th Cir. 1997). The court may also consider a
5 document on which the complaint necessarily relies if the document is central to the
6 plaintiff's claim. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).
7 Matters subject to judicial notice are also appropriate for consideration. *Lee v. City of*
8 *Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001.) All of the exhibits fall into at least one
9 of these categories.

10 Exhibit 1 to the Motion to Dismiss is Defendant Norean Sablan's letter of August
11 14, 2014, giving notice to Plaintiff of allegations against him. (Doc. 19-1.) Plaintiff
12 summarizes and quotes from the letter in his Complaint. (Compl., ¶¶ 29-31, 33.) The
13 letter is thus part of the Complaint. *See Cooper*, 137 F.3d at 623 ("a court ruling on a
14 motion to dismiss may consider the full texts of documents which the complaint quotes
15 only in part"). The letter is also central to Plaintiff's claim that he was not afforded due
16 process.

17 Exhibit 2 is the ABOR Student Disciplinary Procedures, ABOR Policy 4-401 to
18 404.¹ Plaintiff references these procedures in his Complaint. (Compl., ¶¶ 44-45, 59-60,
19 93-94.) The procedures are also central to Plaintiff's claim that he was not afforded due
20 process. The procedures are also properly subject to judicial notice. *See Daglian v.*
21 *Devry Univ., Inc.*, 2007 WL 5625508, *2 (C.D. Cal. 2007) (taking judicial notice of
22 information on UCLA's website and observing that courts regularly take judicial notice
23 of official policies and records posted on government agency websites); *Dao v. Univ. of*
24 *California*, 2004 WL 1824129, at *3-4 (N.D. Cal. 2004) (taking judicial notice of
25 university personnel policy "on the basis that it is a record of an administrative body").
26
27

28 ¹ Defendants inadvertently submitted a different policy and have now filed a
Notice of Errata containing the correct Exhibit 2 (doc. 33).

1 Exhibit 3 is Defendant Ron Hicks' letter of November 3, 2014, giving notice to
2 Plaintiff of new allegations against him and placing him on interim suspension. Plaintiff
3 refers to and describes the letter in his Complaint. (Compl., ¶¶ 79-80.) The letter is thus
4 part of the Complaint, and it is also central to Plaintiff's claim that he was not afforded
5 due process.

6 Exhibit 4 is Plaintiff's Notice of Claim and Amended Notice of Claim. Because
7 the Notice of Claim and Amended Notice were filed with Defendant ABOR in relation
8 to this action, and because they are on an official form and their authenticity is
9 unquestioned, they are suitable for judicial notice. Even if the Notice of Claim and
10 Amended Notice are deemed extraneous, the Court should consider them. The issue of
11 Plaintiff's noncompliance with the notice-of-claim statute is already before the Court,
12 and the Notice of Claim and Amended Notice provide the record for deciding the issue.
13 The Court could convert that portion of the motion dealing with the notice of claim to
14 one for summary judgment, and give Plaintiff notice of the conversion. Plaintiff has
15 already addressed the issue, and it would be a waste of judicial resources to delay
16 resolution of the issue.

17 **II. Plaintiff Has Not Alleged the Deprivation of a Clearly Established Right.**

18 **A. Procedural Due Process**

19 Plaintiff contends that he had "a property and liberty interest in his education at
20 ASU and his post-graduate research as part of his education." (Response at 6.)
21 However, he identifies no factual allegations and makes no argument to support any
22 liberty interest. He likewise offers no allegations or argument to support a property
23 interest in post-graduate research. Under the reduced sanction imposed on him, Plaintiff
24 was permitted to receive his Ph.D. and given a three-year campus restriction. (Compl., ¶
25 96.) He cannot point to any statute or rule that gave him "a legitimate claim of
26 entitlement" to work at ASU or to access designated labs or buildings on campus
27 following his graduation.
28

1 Assuming Plaintiff had a property interest in his education prior to graduation, he
2 fails to identify how he was deprived of it. He incorrectly contends that he was
3 suspended for four months. Allegations contradicted by documents referenced in the
4 Complaint or properly subject to judicial notice need not be taken as true. *Sprewell v.*
5 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2002). Plaintiff was given notice of
6 a suspension, but he appealed. (Compl., ¶¶ 42-43, 59-60.) By operation of the
7 disciplinary procedures, the filing of an appeal stayed the suspension. (Exhibit 2
8 [Amended ABOR Policy 5-403(C)(12)].) Soon thereafter, the suspension was changed
9 to a campus restriction, and Plaintiff graduated with his Ph.D. He suffered no
10 deprivation of property and liberty protected by the Due Process Clause.

11 Even if he did, he makes no meaningful argument that the procedures afforded
12 him were constitutionally inadequate. He acknowledges that he received notice of the
13 allegations against him (Compl., ¶¶ 29-30; MTD Exhibit 1) and multiple opportunities to
14 present his side of the story. (Compl., ¶¶ 33-34, 39-41.) He now makes the conclusory
15 assertions that he was “not properly informed” of the evidence against him or given a
16 “meaningful” opportunity to be heard but offers no support for these conclusions. His
17 main complaint is that he did not have an appeal hearing. But he fails to address the
18 cases saying that an appeal is not constitutionally required, or to point to any authority
19 suggesting that an appeal or trial-like evidentiary hearing is constitutionally required for
20 the campus restriction imposed on him.

21 In addition, Plaintiff fails to demonstrate that the contours of the right to
22 procedural due process were clearly established. He does not mention, much less
23 attempt to apply, the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).
24 He simply says that *Goss v. Lopez* was decided in 1975, but that case emphasized that
25 the requirements of due process would vary depending on the circumstances, such as the
26 seriousness of the disciplinary action. 419 U.S. at 581-84. Plaintiff has not pointed to
27 any controlling precedent that would have put a reasonable official on notice that the
28 alleged actions of Sablan, Hicks, and Castle violated due process.

1 **B. Substantive Due Process**

2 Plaintiff’s sole argument concerning substantive due process is that the actions of
3 Sablan, Hicks, and Castle shock the conscience. (Response at 9.) He makes no attempt
4 to explain how any of their alleged actions in carrying out the university’s disciplinary
5 procedures was conscience-shocking. He fails to address the cases that have rejected
6 substantive due process claims in the school-discipline context, or to identify authorities
7 that have found a substantive due process violation in this context. It is the Plaintiff’s
8 burden to show that the right to substantive due process was clearly established. *Alston*
9 *v. Read*, 663 F.3d 1094, 1098 (9th Cir. 2011). Because Plaintiff has in no way shown
10 that the contours of the right were sufficiently clear that a reasonable official would have
11 understood that disciplining him for sexual misconduct violated substantive due process,
12 Defendants Sablan, Hicks, and Castle are entitled to qualified immunity. *Krainski v.*
13 *Nevada ex rel. Bd. of Regents*, 616 F.3d 963, 970 (9th Cir. 2010); *cf. Lum v. Jensen*, 876
14 F.2d 1385 (9th Cir. 1989) (discussing substantive due process and finding that it is not
15 clearly established in the context of public employment).

16 **C. Right to Privacy**

17 In a heading, Plaintiff contends that his constitutional right to privacy was
18 “clearly established,” but he provides no support for this conclusion. (Response at 9-10.)
19 His citation to a handful of cases that have recognized a right to privacy in other
20 contexts is not enough to overcome qualified immunity. As discussed above, the scope
21 and contours of the right must be clearly established in a “particularized” sense. *See*
22 *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

23 Plaintiff alleges that the individual Defendants talked about his disciplinary case.
24 He is unable to point to any authority holding such a disclosure unconstitutional. He
25 attempts to distinguish *Wyatt v. Fletcher*, 718 F.3d 496 (5th Cir. 2013), on its facts. But
26 the significance of *Wyatt* lies in its recognition that there is no clearly established
27 constitutional right to informational privacy. *Id.* at 508-09; *see also Wampler v. Carson*
28

1 *City Sheriff*, 2012 WL 3205943, at * 7 (D. Nev. 2012) (describing the right as “murky, at
2 best” and the scope of the right as “unclear”).

3 **III. Plaintiff Has Not Alleged a Violation of Title IX.**

4 Plaintiff fails to identify any “particular facts sufficient to cast some articulable
5 doubt on the accuracy of the outcome of the disciplinary proceeding.” *See Doe v.*
6 *Columbia University*, 101 F. Supp.3d 356, 367-68 (S.D.N.Y. 2015). Nor has he set forth
7 particularized facts indicating that gender was a motivating factor for an erroneous
8 disciplinary decision. *Id.*; *see also Salau v. Denton*, 2015 WL 5885641, at * 3-4 (W.D.
9 Mo. 2015), appeal dismissed. His Title IX claim is insufficient and should be dismissed.

10 **IV. Plaintiff’s Failure to Comply with the Claim Statute Bars His State-Law**
11 **Claims Against the Individual Defendants.**

12 Plaintiff does not dispute that he failed to file a notice of claim with the individual
13 defendants Hicks, Sablan, Castle, and Seager. He reiterates his objection to the Notice
14 of Claim and Amended Notice (Exhibit 4 to the Motion to Dismiss). As discussed above
15 in Section I, the Court should take judicial notice of the Notice of Claim and Amended
16 Notice, or it should convert the motion to one for summary judgment insofar as it relates
17 to the issue of noncompliance with the notice-of-claim statute.

18 Plaintiff argues that Hicks, Sablan, Castle, and Seager should be equitably
19 estopped from raising the notice-of-claim defense. (Response at 12-13.) The doctrine of
20 equitable estoppel is inapplicable. The elements of estoppel are (1) the party to be
21 estopped commits acts inconsistent with a position it later adopts; (2) reliance by the
22 other party; and (3) injury to the latter resulting from the former’s repudiation of its prior
23 conduct. *Gorman v. Pima County*, 287 P.3d 800, 804-05, ¶ 21 (Ariz. App. 2012). When
24 applied to a government actor, the actions relied on must bear some “considerable degree
25 of formalism.” *Id.* at 805. Estoppel applies only to the authorized acts of government
26 officials when necessary to prevent a “serious injustice.” *Id.*

27 Plaintiff’s estoppel argument meets none of these requirements. He fails to
28 identify any acts—let alone formal acts—by Hicks, Sablan, Castle, or Seager that caused

1 him not to serve them with a notice of claim. He merely argues that his service of a
2 Notice of Claim and Amended Notice of Claim on ABOR, using a form prepared by
3 ABOR, was sufficient also for service on the individual Defendants. This argument
4 cannot be squared with either the form or the statute. The form is expressly designed to
5 be used for filing a “Notice of Claim *Against the Arizona Board of Regents.*” (Exhibit 4
6 [emphasis added].) It does not instruct claimants where or how to file claims against
7 individuals. *Id.* It contains space for a claimant to fill in information regarding the claim
8 and it lists the address and person to which service of the notice of claim should be
9 made. *Id.* The form thus promotes compliance with the notice-of-claim statute for
10 claims against ABOR. The form is optional; most notices of claim are letters. Plaintiff’s
11 use of the form in no way prevented or excused him from the requirement of serving a
12 notice of claim on Hicks, Sablan, Castle, or Seager.

13 Indeed, the form states that a “claim must be filed in accordance with A.R.S. §
14 12-821.01.” *Id.* The statute expressly provides that a notice of claim must be filed with
15 the “person or persons authorized to accept service for the public entity, public school or
16 public employee.” A.R.S. § 12-821.01(A). No reasonable person would interpret the
17 language “in accordance with” on the form to mean that he need not comply with the
18 statute. Similarly, no reasonable person would think that service of a notice of claim on
19 one party would constitute service on all parties.

20 Plaintiff’s failure to serve a notice of claim on Hicks, Sablan, Castle, or Seager is
21 fatal to his state-law claims against them. Plaintiff has made no showing that any of
22 them took any action that led him not to serve them with a notice of claim. Plaintiff’s
23 equitable estoppel argument must be rejected.

24 **V. Plaintiff Should Not Be Given Another Chance to Amend His Complaint.**

25 Plaintiff argues that he should be allowed to amend to amend his complaint.
26 While it is sometimes appropriate to give a plaintiff an opportunity to cure deficiencies,
27 it is not appropriate here. First of all, Plaintiff’s complaint is *legally* defective. The
28 defects are not curable. No amendment to the complaint would permit Plaintiff to

1 maintain state-law claims against the individually named Defendants when he has not
2 served them with a notice of claim. No amendment to the complaint would permit
3 Plaintiff to maintain a § 1983 claim against them either because the predicate rights
4 invoked here—due process and informational privacy—were not sufficiently clearly
5 established in a “particularized sense” required to overcome qualified immunity.

6 In addition, Plaintiff has already had an opportunity to amend his complaint, and
7 he refused. The court instructed the parties to meet and confer before the motion to
8 dismiss to discuss whether deficiencies in the complaint could be cured by amendment.
9 (Doc. 4.) The parties did meet and confer. (Exhibit A.) Plaintiff dismissed the concerns
10 raised by Defendants and declined to make any changes to his complaint. (Doc. 20.) He
11 has pleaded his best possible case, and should not be given another opportunity to do
12 what he refused to do earlier.

13 Respectfully submitted this 22nd day of April, 2016.

14 Mark Brnovich
15 Attorney General

16 s/Michael K. Goodwin
17 Michael K. Goodwin
18 Ann Hobart
19 Assistant Attorney General
20 Attorneys for Defendants

21 I certify that I electronically
22 transmitted the attached document
23 to the Clerk’s Office using the
24 CM/ECF System for filing and
25 transmittal of a Notice of Electronic
26 Filing to the following CM/ECF
27 registrant, this 22nd day of April,
28 2016, to:

1 J. Paul Palmisano
2 Acacia Law Group
3 1839 S. Alma School Road
4 Mesa, Arizona 85210
5 Attorney for Plaintiff

6 s/Rebecca Warinner
7 _____
8 #5034265

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